

May 27, 2011

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> St. SW  
Washington, DC 20554

RE: Notice of *Ex Parte* presentation in: WC Docket Nos. 10-90, 7-135, 05-337, 03-109  
GN Docket No. 09-51  
CC Docket No. 01-92, 96-45

Dear Ms. Dortch:

On May 26, 2011, Harold Feld, Legal Director, Public Knowledge (PK), met with the following staff of the Office General Counsel with regard to the above captioned proceedings: Austin Schlick, Julie Veach, Diane Griffin Holland, and Debra Weiner.

PK restated that the failure to classify broadband as a Title II service raises significant difficulties for expanding the universal service fund to include creation of CAF and disbursement of funds high cost funds to entities other than ETCs designated under Section 214(e). However, the authority asserted by the Commission under Section 706 and under its forbearance authority, if sufficient for the modifications proposed in the NPRM, would also be sufficient to support the proposals made by PK/Benton in their April 18 comments. In particular, the authority asserted by the Commission would permit both creation of a small fund for the purchase of equipment for self-provisioning entities in unserved communities pursuant to Section 706's mandate to ensure deployment where broadband is not being deployed in a timely manner and application of Section 10 forbearance to the common carrier requirement of Section 214(e).

PK addressed whether USF's limited exemption from the Antideficiency Act, 31 U.S.C. 1341, would include expansion of the fund to broadband and/or would permit payment to entities outside Section 214(e). PK conceded that relying on Section 706 alone presents difficulties, as the language states that the exemption applies: "to the expenditure or obligation of amounts attributable to such contributions for universal service support programs established pursuant to *that section*" (emphasis added). "That section" clearly refers to Section 254. The CAF program, or any set aside such as that suggested by PK, would arguably be 'established' under Section 706 rather than under Section 254.

PK proposed two solutions. First, and on the most solid legal footing, the Commission could classify interconnected VOIP as a Title II service. The Commission has already sought notice on this proposal, and the law clearly supports – indeed mandates – classifying interconnected VOIP as Title II. Congress explicitly adopted a definition of "telecommunications service" that was both technology neutral and independent of the public switched telephone network (PSTN). If

that definition has any meaning, it surely applies to a service that is marketed as a substitute for traditional telephone service and interconnects with the PSTN.

The advantage of classifying VOIP as Title II would be that it allows Title I information service providers to “offer” a Title II service in accordance with the requirement of Section 214(e) by reselling another party’s interconnected VOIP service. Thus, a broadband provider could become eligible for designation as an ETC by a state PUC or Commission by agreeing to resell an independent interconnected VOIP service such as Vonage as part of its service offering without itself being classified as a “common carrier” as would be otherwise required by Section 214(e).

Alternatively, the Commission could interpret the creation of CAF as occurring through a combination of Section 706 and Section 254. The plain language of the USF exemption does not require that the relevant program be “established pursuant to” Section 254 *exclusively*. The difficulty with this approach is that the Commission is using Section 706 to override an express limitation in Section 254 that requires disbursement of the fund to *telecommunications service* providers to cover the provision of *telecommunications* services and capabilities. Arguably, Section 706 would “establish” CAF despite Section 254, not pursuant to Section 254.

In accordance with the FCC’s *ex parte* rules, this document is being electronically filed in the above-referenced dockets today.

Sincerely,

\_\_\_\_\_/s/  
Harold Feld  
Legal Director  
Public Knowledge

CC: Austin Schlick  
Julie Veach  
Diane Griffin Holland  
Debra Weiner